Supreme Court, U.S.
FILED
OCT 27 2006
OFFICE OF THE CLERK

No. 05-1442

IN THE

Supreme Court of the United States

NICHOLAS SARGENT, etc., *et al.*,

Petitioners,

v.

CITY OF TOLEDO POLICE DEPARTMENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

MARTIN S. DELAHUNTY III*
OHIO BAR REGISTRATION 0039014
PETER D. TRASKA
OHIO BAR REGISTRATION 0079036
ELK & ELK, CO., L.P.A.
Landerhaven Corporate Center
6110 Parkland Boulevard
Mayfield Heights, Ohio 44124
(440) 442-6677

* *Counsel of Record*

Counsel for Petitioners

204379

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. May police officers enter a home where a loud party is in progress where no other indication of exigent circumstances is present, and without exercising the opportunity to seek consent of any resident of the home?

II. Is an officer's entry into a home *per se* "reasonable" under the Fourth Amendment for the sole reason that another officer is already inside that home?

III. Does a party complaining of a deprivation of rights under 42 U.S.C. § 1983 also have independent rights under the laws of his own state?

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ARGUMENT IN SUPPORT OF REHEARING

Now comes the Petitioner, Nicholas Sargent, individually and in his capacity as the representative of Mr. Donald Sargent, deceased, and hereby requests that this Court rehear its decision of October 2, 2006, denying the Petition for a Writ of Certiorari. This request is made under S. Ct. R. 44(2).

Briefly restated, this case concerns the shooting death of Donald Sargent at the hands of an officer of the Toledo, Ohio, police department. The shooting occurred within 30 seconds of the officer's warrantless entry into the Decedent's home. The officers were at that time responding only to a noise disturbance call. They admitted on the record that they did not suspect any felony was in progress, that any violent or dangerous activities were occurring, nor that any evidence of any crime was about to be destroyed. The first officer merely walked into the Decedent's home without even trying to obtain consent, notwithstanding the admitted fact that the Decedent was standing directly in front of the officer. When the Decedent fled, the officers chased him into his room. While the Decedent was attempting to stow a gun, Respondent Taylor burst through his bedroom door, and fired the shot that killed Donald Sargent. Neither officer realized the Decedent had been carrying a gun until the moment the shot was fired. Donald Sargent was chased to his death because he fled an unlawful police entry into his home.

I. This Court Has Twice Recently Emphasized That The Police Must Give Citizens In Their Own Homes The Opportunity To Comply With Police Orders.

Even since the Petition for Certiorari was filed in this case, this Court issued a new pronouncement highlighting the necessity of the opportunity to comply with a police command issued to a citizen within his own home. *Hudson v. Michigan*, 126 S. Ct. 2159, 2165 (2006). This Court stated:

> Until a valid warrant has issued, citizens are entitled to shield "their persons, houses, papers, and effects," U.S. Const., Amdt. 4, from the government's scrutiny. ***
>
> (1F) One of those interests is the protection of human life and limb, **because an unannounced entry may provoke violence in supposed self-defense by the surprised resident**. *See, e.g., McDonald v. United States*, 335 U.S. 451, 460-461, 69 S. Ct. 191, 93 L. Ed. 153 (1948) (Jackson, J., concurring). *See also Sabbath*, 391 U.S., at 589, 88 S. Ct. 1755, 20 L. Ed. 2d 828; *Miller*, 357 U.S., at 313, n. 12, 78 S. Ct. 1190, 2 L. Ed. 2d 1332. Another interest is the protection of property. Breaking a house (as the old cases typically put it) absent an announcement would penalize someone who "'did not know of the process, of which, **if he had notice, it is to be presumed that he would obey it**. . . .'" *Wilson*, 514 U.S., at 931-932, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (quoting Semayne's Case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195-196 (K. B. 1603)). **The knock-and-announce rule gives individuals "the opportunity to comply with the law and to avoid**

> **the destruction of property occasioned by a forcible entry."** *Richards*, 520 U.S., at 393, n. 5, 117 S. Ct. 1416, 137 L. Ed. 2d 615. See also *Banks*, 540 U.S., at 41, 124 S. Ct. 521, 157 L. Ed. 2d 343. **And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the "opportunity to prepare themselves for" the entry of the police.** *Richards*, 520 U.S., at 393, n. 5, 117 S. Ct. 1416, 137 L. Ed. 2d 615. "The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed." *Ibid.* **In other words, it assures the opportunity to collect oneself before answering the door.** [Emphasis added.]

Hudson, 126 S. Ct. at 2165 (2006). The Respondent's entry in this case was a patent violation of the Fourth Amendment interests this Court has repeatedly upheld as the "chief evil" against which its protections are directed. While the Petitioner did not frame the issue in terms of the failure to "knock and announce" within the Petition for Certiorari, the importance of that rule and of the opportunity to comply was extensively briefed in the Sixth Circuit Court of Appeals. Thus, the issue is on the record, and this Court's recent acknowledgment of the importance of the opportunity to comply with police business at the home cannot be denied.

The importance of this issue is highlighted by the fact that this Court also just decided a second case involving a very closely related examination of a warrantless entry. In *Brigham City v. Stuart*, 126 S. Ct. 1943 (2006), this Court took care to detail that a warrantless entry made to stop a

fight in progress was constitutional, so long as an *attempt* was made at getting the attention of the persons inside the house:

> Under these circumstances, there was no violation of the Fourth Amendment's knock-and-announce rule. Furthermore, once the announcement was made, the officers were free to enter; it would serve no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence.

Brigham City v. Stuart, 126 S. Ct. 1943, 1949 (2006). This case now stands contrary to *Stuart* because it is undisputed that neither officer made *any* attempt to get the attention of persons inside the home, or gain the cooperation of the Decedent.

This Court's words in *Hudson* are vividly illustrated by the record before this Court. Indeed, the Respondent's entry did provoke a reaction, albeit a less violent action than even typically associated with self defense. Donald Sargent violated no law whatsoever by fleeing, but paid for this lawful prerogative with his life. The "opportunity to comply" is more than a matter of courtesy. In this case, as it is "presumed that he would obey" a lawful notice of the intentions of the Respondent, a knock or announcement of the Respondent's purpose would have saved a life.

II. This Court Has Recently Emphasized The Crucial Role Of Civil Remedies For Knock And Announce Violations As A Deterrent To Police Misconduct.

Also in *Hudson*, this Court emphasized that civil litigation is an effective deterrent for violations of the knock and announce rule. However, this case still stands as a repudiation of that very notion. This Court stated:

> (1I) It seems to us not even true, as Hudson contends, that without suppression there will be no deterrence of knock-and-announce violations at all. Of course even if this assertion were accurate, it would not necessarily justify suppression. Assuming (as the assertion must) that civil suit is not an effective deterrent, one can think of many forms of police misconduct that are similarly "undeterred." When, for example, a confessed suspect in the killing of a police officer, arrested (along with incriminating evidence) in a lawful warranted [*2167] search, is subjected to physical abuse at the station house, would it seriously be suggested that the evidence must be excluded, since that is the only "effective deterrent"? And what, other than civil suit, is the "effective deterrent" of police violation of an already-confessed suspect's Sixth Amendment rights by denying him prompt access to counsel? Many would regard these violated rights as more significant than the right not to be intruded upon in one's nightclothes—and yet nothing but "ineffective" civil suit is available as a deterrent. And the police incentive for those violations is arguably greater than the incentive for disregarding the knock-and-announce rule.

*** Dollree Mapp could not turn to 42 U.S.C. § 1983 for meaningful relief; ***. It would be another 17 years before the § 1983 remedy was extended to reach the deep pocket of municipalities, [cite omitted]. Citizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after *Mapp*, with this Court's decision in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

Hudson complains that "it would be very hard to find a lawyer to take a case such as this," Tr. of Oral Arg. 7, **but 42 U.S.C. § 1988(b) answers this objection**. Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs. This remedy was unavailable in the heydays of our exclusionary-rule jurisprudence, because it is tied to the availability of a cause of action. For years after Mapp, "very few lawyers would even consider representation of persons who had civil rights claims against the police," but now "much has changed. Citizens and lawyers are much more willing to seek relief in the courts for police misconduct." M. Avery, D. Rudovsky, & K. Blum, Police Misconduct: Law and Litigation, p v (3d ed. 2005); see generally N. Aron, Liberty and Justice for All: Public Interest Law in the 1980s and Beyond (1989) (describing the growth of public-interest law). The number of public-interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded.

> *** **As far as we know**, civil liability is an [*2168] effective deterrent here, as we have assumed it is in other contexts. *See, e.g., Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001) ("[T]he threat of litigation and liability will adequately deter federal officers for Bivens purposes no matter that they may enjoy qualified immunity" (as violators of knock-and-announce do not)); *see also Nix v. Williams*, 467 U.S. 431, 446, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984).

Hudson, 126 S. Ct. at 2167-2168 (2006). This Court thus put a great deal of faith into civil litigation as an effective deterrent to violations of the knock and announce rule. The civil remedy of 42 U.S.C. § 1983 cannot "answer the objection" that knock and announce violations are too easily dismissed when a the lower courts can so easily devalue the opportunity to comply with police commands.

This Court's reliance on civil litigation to deter violations of the knock and announce rule is inscrutable in theory. In practice, however, this case illustrates the dangerous potential for that remedy to provide nothing to an aggrieved citizen, even when the warrant requirement was clearly disregarded and no opportunity was made to obtain consent. Unless this Court accepts jurisdiction, this case will militate against civil litigation deterring police misconduct.

III. This Court Should Accept Jurisdiction To Clarify That State Law Provides An Independent Basis For Deciding Police Excessive Force Claims.

The law of the State of Ohio received no more consideration than a single footnote in this case. Petitioner has previously argued that for a federal court of appeals to dismiss all state law claims with a single footnote is to do harm to the federalist structure of our laws. Since the Petition was filed, Justice Stevens has observed that, in addition, the adjudication of search and seizure cases on state law grounds can decrease federal litigation:

> The Utah Supreme Court, however, has made clear that the Utah Constitution provides greater protection to the privacy of the home than does the Fourth Amendment. See *State v. Debooy*, 2000 UT 32, P12, 996 P.2d 546, 549. And it complained in this case of respondents' failure to raise or adequately brief a state constitutional challenge, thus preventing the state courts from deciding the case on anything other than Fourth Amendment grounds. See 2005 UT 13, P12, 122 P. 3d 506, 510. "[S]urpris[ed]" by "[t]he reluctance of litigants to take up and develop a state constitutional analysis," *ibid.*, the court expressly invited future litigants to bring challenges under the Utah Constitution to enable it to fulfill its "responsibility as guardians of the individual liberty of our citizens" and "undertak[e] a principled exploration of the interplay between federal and state protections of individual rights," *id.*, at 511. The fact that this admonishment and request came from the Utah Supreme Court in this very case not only demonstrates that the prosecution selected the wrong case for establishing the rule it wants, but indicates that the Utah Supreme Court would probably adopt

> the same rule as a matter of state constitutional law that we reject today under the Federal Constitution.
>
> Whether or not that forecast is accurate, I can see no reason for this Court to cause the Utah courts to redecide the question as a matter of state law. Federal interests are not offended when a single State elects to provide greater protection for its citizens than the Federal Constitution requires.

Stuart, 126 S. Ct. at 1950 (2006)(Stevens, J., concurring). Similarly, even since the Petition was filed, the Ohio Supreme Court has re-affirmed that Ohio law provides greater search and seizure safeguards than federal law. *State v. Farris*, 109 Ohio St.3d 519, ¶¶ 46-48 (2006)(re-stating that Ohio's Constitution provides greater protection against warrantless search and seizure than the U.S. Constitution).

The District Court and the Circuit Court of Appeals caused Ohio's state law to vanish in this case. This case was properly pled in *state* court under both federal and *state* law standards. While removal was proper, the subsequent devaluation of state law was certainly not. Moreover, as observed by Justice Stevens, adequate consideration of state law has the potential to reduce the number of claims prosecuted through the federal appellate system because the courts need not disturb a judgment decided on state law grounds.

CONCLUSION

Petitioners urge rehearing of this Court's denial of jurisdiction over this appeal, for three main reasons. First, even since the Petition was filed, this Court has twice reaffirmed the importance of the "knock and announce" rule. In this case, adherence to that rule would likely have saved a life. Second,

in *Michigan v. Hudson*, this Court just underscored the importance of civil litigation as a deterrent to police misconduct. This case still stands in contravention to that aspect of this Court's holding. Finally, Justice Stevens has rightly observed that when the courts and litigants properly consider state law, the need to determine cases based on federal law is decreased.

This case presents a gross injustice that only this Court can address. Further, this case presents numerous questions regarding the warrantless entry into the home, questions of such importance that this Court has recently issued no fewer than three opinions discussing closely related issues. This Court should accept jurisdiction in order to provide guidance to future police actors and citizens alike, as well as to ensure a meaningful remedy for the family of Donald Sargent.

Respectfully submitted,

MARTIN S. DELAHUNTY III*
OHIO BAR REGISTRATION 0039014
PETER D. TRASKA
OHIO BAR REGISTRATION 0079036
ELK & ELK, CO., L.P.A.
Landerhaven Corporate Center
6110 Parkland Boulevard
Mayfield Heights, Ohio 44124
(440) 442-6677

Counsel for Petitioners

* *Counsel of Record*

CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.

Martin S. Delahunty III